

REMARKS

Claims 1-39 were originally filed in the present application. In the Restriction Requirement mailed December 15, 2008, the Examiner restricted Claims 1-11, 18-21, 26-27, 31, 33, and 35 into the following three groups:

- I. Claims 1-11 and 18-21, drawn to an antibody or antigen-binding fragment thereof that binds to an extracellular localized epitope of Hsp70 on tumor cells.
- II. Claims 26, 27, and 31, drawn to a method of determining a tumor comprising assaying cells in a sample from a patient with an antibody that binds to an extracellular localized epitope of Hsp70.
- III. Claims 33 and 35, drawn to a method of targeting a diagnostic agent to a cell which express[es] an extracellular localized epitope of [H]sp70 on the cell surface, comprising administering to the subject a therapeutically effective amount of a bi- or multifunctional molecule of any of the claims 19 to 21.

Applicant herein elects, without traverse, to prosecute the claims of Group I, Claims 1-11 and 18-21. Applicant herein cancels claims 26, 27, 31, 33, and 35 in order to further her business interests and the prosecution of the present application, yet without acquiescing to the Examiner's arguments, and while preserving the right to prosecute the canceled (or similar) claims in the future. Applicant notes that claims 12-17, 22-25, 28-30, 32, 34, and 36-39 were not included in any Group listed above, and therefore elects to continue prosecution of said claims. Accordingly, currently pending are claims 1-25, 28-30, 32, 34, and 36-39.

In the Restriction Requirement mailed December 15, 2008, the Examiner stated that the application disclosed/contained claims directed to the following patentably distinct species:

The species of tumors as listed in claims 2 and 31.

The species of tumors listed in claim 2 are: human tumors selected from the group consisting of colon, lung, stomach, pancreas, head and neck, ovary, and/or breast cancer, melanoma, glioblastoma, sarcoma and or leukemia such as AML, ALL, MDS or blastocytoma.

The species of tumors listed in claim 31 are: carcinomas of lung, colorectum, pancreas, larynx, stomach, head, neck, breast, ovaries, uterine cervix, liver, peripheral and central nervous system, sarcomas, chronic myeloic leukemia (CML), acute myeloic leukemia (AML), acute lymphatic leukemia (ALL), non Hodgkin Lymphoma (NHL), myeloproliferative syndrome (MPS), myelodysplastic syndrome (MDS), plasmocytoma, melanoma and metastatic tumors.

The Examiner directs Applicant to elect a single disclosed species from the groups listed above for prosecution on the merits to which the claims shall be restricted if no generic claim is finally held to be allowable.

Applicant herein selects, with traverse, the following species: human colon tumor of the group recited in claim 2. Applicant notes that “A requirement for restriction is permissible if there is a patentable difference between the species as claimed and there would be a serious burden on the examiner if restriction is not required” (MPEP 808.01(a)). In the office action of December 15, 2008, the Examiner stated that species listed above are not regarded as being of similar nature because the tumors possess distinct pathological features. Applicant respectfully disagrees with this assertion, noting that all species listed above are of similar nature in that all species retain the special technical feature of possession of the common epitopes recited in claim 1. Furthermore, MPEP 808.01(a) specifies “Election of species should not be required between claimed species that are considered clearly unpatentable (obvious) over each other. In making a requirement for restriction in an application claiming plural species, the examiner should group together species considered clearly unpatentable over each other.” Applicant notes that no such indication has been made by the Examiner in the instant species restriction requirement.

CONCLUSION

As such, Claims 1-25, 28-30, 32, 34, and 36-39 are pending and under examination following entry of Applicant's response to the outstanding Restriction requirement.

Respectfully submitted,

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